IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1975

No. 75-1387

MONONGAHELA APPLIANCE COMPANY,
A WEST VIRGINIA CORPORATION,
PETITIONER

VS.

COMMUNITY BANK AND TRUST, N.A.,
A NATIONAL BANKING ASSOCIATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

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STATEMENT

Throughout the progress of this case in the District Court, in the United States Court of Appeals for the Fourth Circuit, and, now, in this Court, Petitioner's effort, in its briefs and

petition, has been to place before opposing counsel for responsive answer, and before the courts for adjudication, the principal and primary issue which is as to whether or not West Virginia Code, 47-6-10, Petition, Page 9, can be construed as an interest allowing state law within the meaning of 12 U.S.C. 85, Petition, Page 5. Petitioner has never questioned that West Virginia Code, 47-6-10, procedurally deprives a corporate borrower of both the defensive shield and the offensive sword provided to borrowers generally by West Virginia Code, 47-6-6, Petition, Page 8. But the corporate borrower from a national bank is deprived of the defensive shield and the offensive sword provided to all borrowers by 12 U.S.C. 86, Petition, Page 6, only in the event West Virginia Code, 47-6-10, is held to be an interest allowing statute within the meaning of 12 U.S.C. 85 — **this because such is the import of both federal statutes, and because the federal usury penalty statute, 12 U.S.C. 86, is exclusive and precludes the application of state usury statutes.** See Petition, Pages 23 and 24 and the cases there cited.

In the courts below, Respondent's briefs at least tacitly recognized this principal and primary issue, but refused to consider the federal and state rules of statutory construction, Cf. Petition, Pages 17 to 23, which are determinative of this issue, except to seek to impose upon West Virginia the construction of West Virginia Code, 47-6-10, placed on the similar New York procedural statute in **Butterworth v. O'Brien**, 23 N.Y. 275, (1858), Cf. Petition, Pages 16 and 17. Apparently upon the authority of the hereinafter considered decision in a United States District Court case from Pennsylvania, in its brief in this Court, Respondent does not even tacitly recognize this principal and primarily issue. While still seeking to impose upon West Virginia the New York Rule of **Butterworth**, Respondent's Brief in this Court still refuses to consider the applicable federal and state rules of statutory construction.

Respondent's Brief in this Court, as did its briefs in the

courts below, (1) cites a number of state court cases not involving either the cited federal statutes or national banks, which, with the exception of **Butterworth**, do no more than hold that procedural state statutes like West Virginia Code, 47-6-10, deprive corporate borrowers of both the defensive shield and the offensive sword provided by state usury penalty statutes like West Virginia Code, 47-6-6; (2) cites a number of clearly inapposite federal court cases; and (3) attaches decisive significance to the ascribed Congressional intent and purpose in enacting 12 U.S.C. 85, while ignoring the inadequacy of the language employed to effectuate such intent and purpose, **and also ignoring the more pertinent but obvious and fully implemented intent and purpose of the West Virginia Legislature in enacting West Virginia Code, 47-6-10, in 1863 before the enactment of the National Banking Act of 1864.** In its brief in this Court, Respondent asks this Court to treat Section 7.7310 of the Comptroller's Manual For National Banks, Petition, Page 3, as "**the common law of national banks.**"

ARGUMENT

I.

West Virginia Code, 47-6-10, Procedurally Denying the Defense of Usury To Corporations, Deprives Corporate Borrowers of Relief Under West Virginia Code, 47-6-6, But Not Under 12 U.S.C. 86, As Code, 47-6-10, Is Not An Interest Allowing Law Within the Meaning of 12 U.S.C. 85.

In the courts below, the Respondent at least tacitly recognized that its successful defense depended upon the judicial determination that West Virginia Code, 47-6-10, served not only its obvious procedural function of depriving corporations of relief under West Virginia Code, 47-6-6, but constituted a state law within the meaning of 12 U.S.C. 85 substantively rendering lawful any rate of interest agreed upon by a corporation. But, here, in this Court, judging from its Points I

and II, Pages 4 to 12, of its brief, Respondent appears to be contending that West Virginia Code, 47-6-10, **in and of itself without more and without regard to whether it performs a substantive interest allowing function within the meaning of 12 U.S.C. 85**, deprives a corporate borrower of the relief provided by the federal usury penalty statute, 12 U.S.C. 86. Any such contention, if actually intended by the Respondent, is interdicted by the unambiguous language of both federal statutes, and by the uniform holdings of this Court and of the Supreme Court of Appeals of West Virginia to the effect that the federal usury penalty statute, 12 U.S.C. 86, is exclusive and precludes the application of state usury statutes. See Petition, Pages 23 and 24 and the cases there cited. Besides, with the dubious exception of the hereinafter considered United States District Court case from Pennsylvania, the cases cited and relied upon by the Respondent provide no support for any such contention.

In the courts below, the keystones of Respondent's theory that West Virginia Code, 47-6-10, performed a substantive interest allowing function within the meaning of 12 U.S.C. 85 were the cases of **Butterworth v. O'Brien**, 23 N.Y. 275, (1858), and **In Re International Raw Material Corporation**, 22 F. 2d 290, at 923, (Second Circuit 1927). Neither of these cases involved either the federal statutes or a national bank. Both cases involved New York state statutes similar to West Virginia's procedural statute, Code, 47-6-10, and its usury penalty statute, Code, 47-6-6. In **Butterworth**, laying the foundation for the New York Rule, after citing its procedural statute similar to West Virginia Code 47-6-10, it was held:

> "Hence evidences of debt securing or reserving as against them (corporations) what would otherwise be an usurious premium are not void or illegal, **but are lawful**, and the whole amount may be recovered in an action."

Without citing **Butterworth**, the Second Circuit case of **In Re International Raw Material Corporation**, Supra, arising in New York, followed the New York Rule. Of course, it was this New York Rule laid down in **Butterworth** which provided the foundation for **McNellis v. Merchants National Bank and Trust Company**, 390 F. 2d 239, (Second Circuit 1968), cited in the opinions of both of the lower courts and discussed in detail in the Petition.

There are several cases not involving either the federal statutes or national banks holding that procedural state statutes like West Virginia Code, 47-6-10, deprive corporate borrowers of relief under state usury penalty statutes like West Virginia Code, 47-6-6, but none of the cases cited by the Respondent go so far as to hold as did **Butterworth** that the state procedural statutes made otherwise usurious rates of interest lawful rates of interest.

In **Baltimore and Ohio Railroad Company v. Wilson**, 2 W.Va. 528, (1868), the first case cited in Respondent's Brief in support of its Point I, the Court held, Opinion, Page 554, that, since Wilson's execution on his judgment against Northwestern Virginia Railroad Company had never been delivered to any officer to be served, there was not any liability upon the garnishee, the Baltimore and Ohio Railroad Company, even if it was indebted to the judgment debtor. From the prefatory Statement, 2 W.Va. 529 to 548, it appears that there were complex accounts between the two railroad companies, and the garnishee sought and obtained, apparently without objection, its Instruction 10, 2 W.Va. 547 and 548, telling the jury that the action of the garnishee in charging the judgment debtor interest on interest did not "**affect with usury the pre-existing just debt**," but that the interest on interest should be eliminated in determining the amount of the indebtedness, if any, of the garnishee to the judgment debtor. After holding that the garnishee was not liable to the judgment creditor and with only the instruction reference to the subject of usury in either the prefatory Statement or the Opinion, the Court,

without elaboration before or after, Opinion, Page 555, said:

> "In the first place no question of usury can arise in this case because incorporate companies are exceptions from the usury laws. Code, Chapter 57, Section 38, Page 337."

Contrary to what appears on Page 4 of Respondent's Brief, the Court's reference was to the Code of Virginia of 1860, which with only immaterial change was enacted in West Virginia in 1863 and became a part of the West Virginia Code of 1868 as Section 22 of Chapter 52, and is now West Virginia Code, 47-6-10. In Petitioner's view of the matter, it would require a truly fabulous flight of fancy to torture the quoted language of the West Virginia Court into a holding that the statute was an interest allowing law of the State of West Virginia within the meaning of 12 U.S.C. 85.

The only other case cited in Respondent's Brief in support of its Point I, that of **In Re International Raw Material Corporation**, Supra, has been discussed above and was discussed in the Petition at Page 16.

So-called Horn Book Law cited on Page 5 of Respondent's Brief in support of its Point II consists of quotations from 45 Am. Jur. 2d, Interest and Usury, Section 319, Page 244; and 91 C.J.S., Usury, Section 74, Page 652. These digest statements are supported only by the citation of cases holding that procedural state statutes like West Virginia Code, 47-6-10, deprive corporations of relief under state usury penalty statutes like West Virginia Code, 47-6-6. None of such cases involved either the federal statutes or national banks. None of such cases undertake to hold that such a procedural state statute is an interest allowing state law within the meaning of 12 U.S.C. 85. The state court cases of **Country Motors, Inc. v. Friendly Finance Corporation**, 13 Wis. 2d 475, 109 N.W. 2d 137; and **Miller v. Reid**, 243 Mich. 694, 220 N.W. 748, cited on Pages 7 and 8 of Respondent's Brief in support of its Point

II are typical of the cases cited by American Jurisprudence and Corpus Juris Secundum, and were included in the list of such cases discussed on Pages 24 and 25 of the Petition.

In the United States District Court case from Minnesota of **Bichel Optical Laboratories, Inc. v. Marquette National Bank**, 336 F. Supp. 1368, (1971), cited on Page 9 of Respondent's Brief in support of its Point II, the District Court was not dealing with an action in the nature of an action of debt under the federal usury penalty statute, 12 U.S.C. 86, but, rather, was dealing with a claim for damages for alleged illegal seizure of plaintiff's funds and an incidental claim for a penalty apparently under a Minnesota usury penalty statute similar to West Virginia Code, 47-6-6, **and, of course, such incidental claim was both substantively and procedurally unsound under the applicable federal usury penalty statute, 12 U.S.C. 86.** Moreover, it is apparent from District Court Judge Neville's Opinion at Page 1370 that the interest charged was not usurious under the borrowed Minnesota interest allowing statute.

In the "**dubious exception**" United States District Court case from Pennsylvania previously adverted to of **Municipal Leasing Systems Inc. v. Northhampton National Bank of Easton**, 382 F. Supp. 968, (E. D. Pa. 1974), cited on Page 7 of Respondent's Brief and being the only case not already discussed herein relied upon by Respondent in support of its Point II, the United States District Court, **upon the authority of Section 7.7310 of the Comtroller's Manual For National Banks, Petition, Page 3**, held that a Pennsylvania procedural statute similar to West Virginia Code, 47-6-10, deprived a corporate borrower of any relief under the federal usury penalty statute, 12 U.S.C. 86. See Point 1 of Syllabus by West. **Transparently, it was this case which induced or provoked the radical shift in Respondent's position discussed, Supra, in the first paragraph of this division of this brief entitled Argument.** Conceding that soundy reasoned interpetive administrative

rulings are entitled to deferential consideration in the construction of statutes, this Court has never granted any such sweeping substantive law making power to any administrative agency. The same is so as to the United States Courts of Appeals. And Petitioner knows of no other similar holding by any of the United States District Courts.

In so radically shifting its position, the Respondent sought to preserve one of its escape bridges by renewing its attempt to impose the New York Rule of **Butterworth** upon West Virginia, Cf. discussion in Petition, Pages 16 and 17. See Pages 10 and 11 of Respondent's Brief. Petitioner's answer to the case of **Allen v. Raleigh-Wyoming Mining Company**, 117 117 W. Va. 631, 186 S.E. 612, (1936), cited on Page 10 of Respondent's Brief, is that the weight of the presumption that the adopting state also adopted the construction **previously** placed on the statute by the courts of the state of origin is dependent upon whether such construction is sound and reasonable. See 82 C.J.S. 862, Statutes, Section 372. There is no presumption in relation to the adoption of the construction of a statute by the courts of the state of origin **subsequent** to its adoption, and such subsequent construction can have no persuasive value when, as here, all the rules of statutory construction stated at Pages 17 to 23 of the Petition were flagrantly ignored.

II.

The Conceded Intent of 12 U.S.C. 85 To Attempt To Insure Equality of Competition Between National and State Banks Is Not Alone Sufficient To Effectuate Such Intent.

This topic is adequately covered in Part III, Pages 25 and 26 of the Petition, and what is there said will not be repeated. Neither is it Petitioner's purpose to further discuss the cases of **Hiatt v. San Francisco National Bank**, 361 F. 2d 504, (Ninth Circuit 1966); and **McNellis v. Merchants National Bank and Trust Company**, 390 F. 2d 239, (Second Circuit 1968), cited on Pages 13 to 17 of Respondent's Brief in support of its Point III because these cases were exhaustivly considered in the Petition. It is Petitioner's purpose to discuss under this topical heading only (1) Respondent's self-serving restatement of Petitioner's position on Pages 12 and 13 of its brief; and (2) Respondent's misconception of the holding of the Court in **Meadow Brook National Bank v. Recile**, 302 F. Supp. 62, (E. D. La. 1969).

At Pages 12 and 13 of Respondent's Brief, Respondent first accurately quoted an excerpt from Petitioner's Original Brief in the Fourth Circuit, and then undertook to self-servingly state what was "**thereby agreed**." What was "**thereby agreed**," and all that was "**thereby agreed**" was what the Petitioner has always contended and the quoted language clearly indicated, and what Respondent knows Petitioner has always contended, that is, that the procedural statute, West Virginia Code, 47-6-10, deprives a corporate borrower of all relief, either defensive or offensive, under the West Virginia usury penalty statute, West Virginia Code, 47-6-6 — nothing more, nothing less.

Respondent then goes on to self-servingly state Petitioner's contention as being that 12 U.S.C. 85 "**created an exception**" prejudicial to national banks. This is sheer fantasy. Petitioner's briefs and petition in the District Court, in the United States Court of Appeals for the Fourth Circuit, and in this Court can be searched in vain for any such statement or any warranted inference that Petitioner's contention was that 12 U.S.C. 85 "**created an exception**" prejudicial to national banks. Petitioner's contention has been, and still is, as stated in Part III, Petition, Pages 25 and 26, to which the attention of this Court is respectfully invited. Equally unfounded and still more fanciful is the claim made at Page 18 of Respondent's Brief that it is Petitioner's contention that "**discrimination was intended**" against national banks located in West Virginia — apparently by 12 U.S.C. 85.

In **Meadow Brook**, Supra, United States District Court Judge Heebe was dealing with a Louisiana statute which expressly provided:

> "That the owner of any promissory note, bond or written obligation for the payment of money, to order or bearer or transferable by assignment, shall have the right to collect the whole amount of such promissory notes, bonds or written obligations, notwithstanding such promissory notes, bonds or written obligations may include a greater rate of interest or discount than eight per cent. per annum: provided, such obligation shall not bear more than eight per cent. per annum after their maturities until paid."

In the Opinion at Page 73 District Judge Heebe, referring to 12 U.S.C. 85, said: "**We hold that it is not applicable and that Louisiana law governs.**" Point 26 of the Syllabus reads:

> "Under Louisiana law, there is no limitation as to amount of interest which lender may charge as long as interest is capitalized."

From the foregoing and Footnote 7, itself, it is crystal clear that what is quoted from Footnote 7 on Pages 17 and 18 of Respondent's Brief as if it were an integral part of the Opinion necessary to the decision is avowedly dicta — wholly unnecessary for the decision of the case.

III.

The Claimed Devastating Consequences to National Banks If the Comptroller's Position Is Not Upheld Furnish No Warrant For Failure To Construe and Apply the Federal and State Statutes As Required By the Applicable Rules of Statutory Construction.

This matter of the supposed devastating consequences to national banks in the event the Comptroller's position is n-

upheld is raised by Respondent in its Point IV on Pages 19 and and 20 of its brief. The case cited by Respondent in support of this point is **Northway Lanes v. Hackley Union National Bank and Trust Company**, 464 F. 2d 855, (Sixth Circuit 1972). In this case the question before the Court was as to the right of the national bank under 12 U.S.C. 85 to charge for loan expenses in the same manner as was permitted by Michigan law to savings and loan associations — **a practice in which Michigan state banks were not permitted to engage.** The Court, citing and quoting at length, Opinion at Page 862, from **Tiffany v. National Bank of Missouri**, 85 U.S. 409, (1873), sustained the position of the national bank. The Court, Opinion at Page 864, cited and quoted with approval the first paragraph of Section 7.7310 of the Comptroller's Manual For National Banks which appears on Page 19 of Respondent's Brief in this Court, but it is abundantly clear that the Court was following **Tiffany** and approving the referenced paragraph of the Manual because it was provided by **Tiffany** with "**warrant in the record and a reasonable basis in law.**" See **Unemployment Compensation Commission v. Aragon**, 329 U.S. 143, (1946), Headnote 6. The second paragraph of Section 7.7310 of the Comptroller's Manual, Petition, Page 3, also quoted on Page 19 of Respondent's Brief, has no such "**warrant in the record and a reasonable basis in law.**"

It has been said that hard cases make bad law. The concluding paragraph on Page 20 of Respondent's Brief in this Court relative to the supposed devastating consequences to national banks if the Comptroller's position is not upheld has all the earmarks of an invitation to this Court to make bad law in the instant case. Of course, this Court will uphold or not uphold the position of the Comptroller dependent upon its construction of the federal and state statutes resultant from the application of the pertinent federal and state rules of statutory construction set forth in the Petition at Pages 17 to 23 —

wholly irrespective of the consequences, devastating or otherwise. The modern tendency has been for the courts to not allow hard cases to make bad law, and, if this was not already more familiar to this Court than to counsel, an almost infinite number and variety of cases, civil and criminal, decided by the courts of last resort of the nation and states, could be cited wherein long standing judicial precedents and administrative rulings have been overturned with the most far-reaching consequences. Accordingly, Petitioner concludes that the supposed devastating consequences will furnish no obstacle to the proper construction by this Court of the federal and state statutes here involved.

CONCLUSION

For the reasons set forth herein and in the Petition the writ of certiorari sought by Petitioner should be granted.

Respectfully submitted,
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